Washington University Law Review

Volume 96 | Issue 5

2019

# Confronting Forfeiture

Joshua Katz
*Washington University School of Law*

# CONFRONTING FORFEITURE

## INTRODUCTION

Phil Parhamovich was pulled over on I-80 in Wyoming.[1] He had changed lanes improperly, and his seat belt was not fastened.[2] Seven hundred seventy-five dollars would have been a reasonable fine. After all, Wyoming law requires seat belts.[3] Failure to wear a seat belt is not grounds for a traffic stop,[4] but if an officer stops a driver for some other reason, the officer is required to note whether the driver was wearing a seat belt; if so, the fine is reduced by $10.[5] Otherwise, the fine will be increased by $25.[6] On the other hand, improper lane usage is grounds for a traffic stop.[7] A first offense is punishable by a fine of $200, or imprisonment for twenty days, or both.[8] Depending on the circumstances, improper lane usage could also be reckless driving,[9] which carries a fine of $750, six months' imprisonment, or both.[10] Parhamovich nearly lost $91,800.[11]

The money represented his life savings; he was on his way to Wisconsin, where he planned to buy a music studio.[12] During the traffic stop, though, under intensive questioning, he lied.[13] When police suggested that the money was indicative of drug crimes and led Parhamovich to believe, incorrectly, that simply carrying so much cash was illegal,[14] he claimed it belonged to a friend.[15] The money was seized under suspicion that it—not Parhamovich—had been involved in a drug crime.[16] Since Parhamovich had denied the money was his, he could not claim it.[17] The fictional friend, of

1. German Lopez, *"It's Been Complete Hell": How Police Used a Traffic Stop to Take $91,800 From an Innocent Man*, VOX (Dec. 1, 2017), https://www.vox.com/policy-and-politics/2017/12/1/16686014/phillip-parhamovich-civil-forfeiture [https://perma.cc/7GCB-NNAF].
2. *Id.*
3. WYO. STAT. ANN. § 31-5-1402(a) (2017).
4. *Id.* § 31-5-1402(d).
5. *Id.* § 31-5-1402(e).
6. *Id.*
7. *See id.* § 31-5-209.
8. *Id.* § 31-5-1201(b)(i).
9. *See id.* § 31-5-229.
10. *Id.* § 31-5-1201(f).
11. Lopez, *supra* note 1.
12. *Id.*
13. *Id.*
14. *Id.* ("He also became concerned, since he was questioned about cash and illegal drugs at the same time, that it was potentially against the law to carry so much cash at once.").
15. *Id.*
16. *Id.*; *see also* Tamara R. Piety, Comment, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 916–917 (1991) (explaining civil forfeiture is in rem proceeding, property is defendant, only guilt of property is at issue, and guilt of objects "sounds uncomfortably like a theory of demonic possession.").
17. Lopez, *supra* note 1.

course, also could not claim the money.[18] As a result, the State of Wyoming maintained that the money was abandoned.[19] The State maintained this, in part, because of Parhamovich's statement that the money was not his.[20] This statement is hearsay,[21] but would be admissible, at least *prima facie*, as an opposing party statement.[22]

At first glance, the *Crawford* doctrine might seem to supersede the opposing party statement exclusion.[23] This doctrine prohibits the admission of testimonial hearsay against criminal defendants.[24] Testimonial hearsay includes statements to the police during non-emergency investigations.[25] Parhamovich's traffic stop was, at least arguably, not an emergency.[26] The police, attempting to discover the source of Parhamovich's money, were, at least arguably, in an investigatory phase.[27] The *Crawford* doctrine might bar the use of this testimonial hearsay in court.[28] But Parhamovich's attorney could not make these arguments, for two reasons. First, Parhamovich did not receive notice of the forfeiture hearing.[29] Second, even if he had been present or represented by counsel, the *Crawford* doctrine would not have applied. That is because the *Crawford* doctrine applies only in criminal

18. *See id.* ("But in letters to Parhamovich and court filings, state officials have essentially taken what happened at face value: They point out that Parhamovich said the cash wasn't his, that he signed a waiver giving up the money, and that the 'friend' the cash supposedly belongs to hasn't turned up.").

19. *Id.*

20. *Id.* (quoting letter from Senior Assistant Attorney General John Brodie to Parhamovich) ("First and foremost, at the time of the stop, you denied having any interest in the currency, and also stated you were completely unaware it was hidden inside the portable speaker located in your vehicle.").

21. *See* FED. R. EVID. 801(c).

22. *Id.* 801(d)(2) (excluding from definition of hearsay a "statement . . . offered against an opposing party . . . and made by the party in an individual or representative capacity.").

23. *See* Crawford v. Washington, 541 U.S. 36 (2004).

24. *See* discussion *infra* Part I.

25. *See* Joelle Anne Moreno, *Finding Nino: Justice Scalia's Confrontation Clause Legacy From Its (Glorious) Beginning To (Bitter) End*, 44 AKRON L. REV. 1211, 1214–15 (2011).

26. *Cf.* Davis v. Washington, 547 U.S. 813, 827–29 (2006) (distinguishing emergency and non-emergency situation for testimonial hearsay purposes).

27. *Compare id.* (finding statements to police non-testimonial when made during an ongoing emergency) *with* Michigan v. Bryant, 562 U.S. 344, 385 (2011) (finding statements to police testimonial where police were in "investigative role").

28. *See infra* Part I. These arguments would most likely not succeed, since 801(d)(2) is an exclusion, not an exception. *See, e.g.*, Williams v. Illinois, 567 U.S. 50, 57 (2012) (holding *Crawford* inapplicable to statements not admitted for the truth of the matter asserted, an 801 exclusion). This, however, is not certain. *See, e.g.*, Mark A. Summers, *Taking Confrontation Seriously: Does* Crawford *Mean that Confessions Must Be Cross-Examined?*, 76 ALB. L. REV. 1805 (2012). Additionally, this may not be an 801(d)(2) opposing party statement at all. Civil forfeiture proceedings are against the property, not its owner. *See* Piety, *supra* note 16, at 16. Parhamovich is not a party, by the state's own logic. At worst, he could be analogized to a codefendant, and testimonial codefendant statements are barred under *Crawford*. *Cf.* Moreno, *supra* note 25, at 1253–1254 (discussing admissibility of codefendant statements, but only where not testimonial).

29. Lopez, *supra* note 1.

cases,[30] and civil asset forfeiture proceedings are not considered criminal.[31] Yet the money was taken only because police suspected a crime. They presumably suspected Parhamovich was involved in the crime, but even if not, they believed the money was involved in the crime.[32] Absent the suspicion that Parhamovich had committed a crime, he would not have faced forfeiture.[33]

What is more, the proceeding, technically a civil case between the State of Wyoming and Parhamovich's money, put Parhamovich in far greater jeopardy than his criminal case.[34] Yet, under the *Crawford* doctrine, he would be protected by the Sixth Amendment from the admission of similar statements in his criminal case,[35] but not his civil case. Justice Scalia, writing the Court's opinion in *Crawford*, held that this strict bifurcation—the full range of hearsay exclusions and exceptions applying in civil cases, while being superseded by the Constitution for certain forms of testimonial hearsay in criminal cases—was mandated by the Constitution's text, as understood through historical precedent in Rome, England, and the early United States.[36]

This Note casts doubt on Scalia's historical analysis. It argues that the historical sources cited in *Crawford* and later cases suggest that the concerns regarding testimonial hearsay also apply in certain civil contexts. Civil asset forfeiture is a prime candidate: it shares important characteristics of criminal proceedings[37] and imposes comparable penalties. Even if the Sixth Amendment is inapplicable in such proceedings, the logic of *Crawford* suggests that, as a policy matter, confrontation should be available in civil asset forfeiture proceedings.[38] This could be done through legislation or through amendment of the Federal Rules of Evidence (FREs).

This Note suggests that *Crawford* protections should be extended to citizens, like Phil Parhamovich, facing asset forfeiture. Part I explains the *Crawford* doctrine and its reasoning. Part II explores the history of Confrontation Clause jurisprudence in the United States and suggests that it belies a rigid separation between civil and criminal contexts. Part III

30. Crawford v. Washington, 541 U.S. 36, 43 (2004); *see also* U.S. CONST. amend VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

31. *See* Piety, *supra* note 16, at 916 ("Because the property, and not its owner, is the 'defendant,' it is *only* the property's 'guilt' that is at issue . . . .").

32. *See id.*

33. *See id.*

34. *See supra* notes 3–11 and accompanying text for comparison of remedies.

35. Improper lane usage is a misdemeanor. *See* WYO. STAT. ANN. § 31-5-1201(a) (2017).

36. *See infra* Part I.

37. *See, e.g.*, Boyd v. United States, 116 U.S. 616, 633–634 (1886) ("We are also clearly of [the] opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal.").

38. *See infra* Part III.

suggests two ways in which civil asset forfeiture might be brought under the *Crawford* umbrella and suggests further extensions of the *Crawford* doctrine into civil contexts.

## I. WHAT IS THE *CRAWFORD* DOCTRINE?

In 2003, the Supreme Court took up *Crawford v. Washington*.[39] Michael Crawford had been convicted of stabbing Kenneth Lee, a man he accused of attempting to rape his wife.[40] While Mr. Crawford did not deny the stabbing, he asserted a claim of self-defense.[41] Crucial to this defense was the question of whether Mr. Lee had drawn a weapon prior to being stabbed.[42] Mr. and Mrs. Crawford both made statements to the police. They differed slightly on this question.[43] Mrs. Crawford's statements made the self-defense claim less credible.[44] At trial, Mrs. Crawford was barred from testifying under state spousal privilege laws.[45] However, Mrs. Crawford's statements to the police were admissible under a hearsay exception in the state rules of evidence,[46] and they were admitted at trial over Mr. Crawford's objection.[47] The jury found Mr. Crawford guilty of assault.[48]

Although the evidence was clearly admissible under the state rules, Mr. Crawford's objection was based on a constitutional right: "to be 'confronted with the witnesses against him.'"[49] The Supreme Court had previously grappled with this precise claim, and so the trial court applied the Supreme Court's rule from *Ohio v. Roberts*.[50] There, the Court had held that:

> [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is

39. 541 U.S. 36 (2004).
40. *Id.* at 38.
41. *Id.* at 40.
42. Mr. and Mrs. Crawford had gone to Mr. Lee's home to confront him, and the two men got into a fight. The sole factual dispute between them was whether, prior to Mr. Crawford stabbing Mr. Lee, the latter had drawn a weapon. *See id.* at 38–40.
43. *Id.* at 38–39. This, at least, is the Court's characterization. It is unclear, from the excerpts provided, exactly what Mr. Crawford asserted in this regard. *See id.* at 38–39. Mrs. Crawford, though, does seem to deny that Mr. Lee had a weapon. *See id.* at 39–40.
44. *See id.* at 39 ("[B]ut her account of the fight itself was arguably different—particularly with respect to whether Lee had drawn a weapon before petitioner assaulted him.").
45. *Id.* at 40 (citing WASH. REV. CODE § 5.60.060(1) (1994)). Under the Washington law, with certain exceptions, not only may a person not be *required* to testify against their spouse, but such testimony is not permitted unless the accused spouse consents. § 5.60.060(1).
46. *Crawford*, 541 U.S. at 40 (first citing State v. Burden, 841 P.2d 758, 761 (Wash. 1992); then citing WASH. R. EVID. 804(b)(3) (2003)). The relevant exception allowed for the admission of hearsay evidence against penal interest, and since Mrs. Crawford's statement indicated that she went to Mr. Lee's home with Mr. Crawford, her statement was against her own penal interest. *Id.*
47. *Id.* at 40–41.
48. *Id.*
49. *Id.* at 40 (quoting U.S. CONST. amend. VI).
50. 448 U.S. 56 (1980).

> unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.[51]

Applying this rule to the case at bar, the trial court found Mrs. Crawford's statements to the police admissible since the statements possessed the requisite indicia of reliability.[52] The Washington Court of Appeals reversed, finding the statements insufficiently reliable.[53] In turn, the Washington Supreme Court reinstated the trial court's conviction, finding the statements sufficiently reliable.[54]

Crucially, the reasoning in the state courts consistently relied on the Supreme Court's holding in *Roberts*, even though the courts reached different conclusions.[55] All along, it was assumed that reliability was the key consideration, as the Court held in *Roberts*.[56] At first glance, this seems beside the point: the Confrontation Clause guarantee does not contain an exception for reliable evidence.[57] It is worth noting, then, why the Supreme Court had reached this conclusion in *Roberts*. As the Court explained, "a primary interest secured by [the provision] is the right of cross-examination."[58] Cross-examination is valuable because it secures the "integrity of the fact-finding process."[59] As a result, the Court in *Roberts* held that where other evidence of reliability is present, the confrontation requirement could be set aside as superfluous.[60] Such, at least, was the situation heading into the Court's consideration of *Crawford*.

In *Crawford*, however, the Supreme Court did not further refine the indicia of reliability test, or even offer a different test. Instead, the Court set aside its *Roberts* jurisprudence.[61] While acknowledging that, under the

---

51. *Id.* at 66.
52. *Crawford*, 541 U.S. at 40.
53. *Id.* at 41.
54. *Id.* at 41–42.
55. *See id.* at 40–42. The appeals court found the statements unreliable for several reasons. *Id.* at 41. The state supreme court agreed that it did not fall within a firmly rooted hearsay exception yet held that it was reliable enough to be permitted under *Roberts* since it "interlock[ed]" with Mr. Crawford's testimony. *Id.* (quoting State v. Crawford, 54 P.3d 656, 663 (Wash. 2002)).
56. *See, e.g.*, State v. Crawford, 54 P.3d at 662 (citing *Roberts*, 448 U.S. at 66) ("Thus, we must determine whether the statement contains a sufficient indicia of reliability to satisfy the confrontation clause.").
57. *Cf.* U.S. CONST. amend VI.
58. *Roberts*, 448 U.S. at 63 (quoting Douglas v. Alabama, 380 U.S. 415, 418 (1965)).
59. *Id.* at 64 (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)).
60. *See id.* at 66.
61. *Crawford*, 541 U.S. at 60–62. While the Court makes clear that it is rejecting the reasoning of *Roberts*, it takes pains to distinguish the holding in that case, noting that in *Roberts*, the admitted out-of-court statements were subject to cross-examination by the defendant at the time they were made. *See id.* at 58. Thus, according to Scalia, *Crawford* is revolutionary only in its reasoning, and the Court's prior Confrontation Clause holdings have, without saying so, respected the distinction articulated in

*Roberts* test, the evidence against Mr. Crawford was admissible,[62] the Court nonetheless held that admitting the evidence would violate the Confrontation Clause.[63] In a unanimous judgment,[64] and an opinion authored by Justice Scalia, the Court held that certain sorts of hearsay evidence violated the Confrontation Clause when admitted against criminal defendants, even though admissible under the applicable rules of evidence.[65] In the jurisprudence announced in *Crawford*, the distinction between admissible and inadmissible evidence in criminal cases, turned not on reliability, but on the precise contours of the Sixth Amendment guarantee.[66] Therefore, under the reasoning in *Crawford*, the Court turned away from the *Roberts* Court's goal-oriented balancing of "competing interests,"[67] and endorsed a formalist view of confrontation.[68]

In setting out this new doctrine, the Court provided only a rough sketch of the outer limits of the confrontation guarantee. Certainly, the doctrine

*Crawford*. *Id.* Although Scalia would later refer often to the "*Crawford* Doctrine," he treats it here as standard Confrontation Clause jurisprudence, inadequately explained in prior cases.

62. *See id.* at 62 ("The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability."). However, there might be reason to doubt this claim, and the Court perhaps could have suppressed the evidence without overruling *Roberts*. *See supra* note 55 and accompanying text; *see also Crawford*, 541 U.S. at 67 (admitting same, while arguing that opinions below show a lack of clarity in prior opinions); *infra* note 64 and accompanying text. *But see Crawford*, 541 U.S. at 64–66 (discussing ways lower courts have applied the *Roberts* test). It is possible that the Court chose to overrule *Roberts* because of this confusion in the lower courts.

63. *Crawford*, 541 U.S. at 68–69 ("In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment.").

64. In a concurrence joined by Justice O'Connor, Chief Justice Rehnquist argued that the testimony would be properly excluded under *Roberts*, and that, accordingly, the Court should not have reached the question of overturning *Roberts*. Id. at 69 (Rehnquist, C.J., concurring). Furthermore, the concurrence argues that the reasoning here is incorrect, and the "indicia of reliability" approach, in addition to reaching the Court's conclusion here, is preferable on its face. *See id.* at 69–76.

65. *See id.* at 68 (majority opinion). An exception, based on founding-era precedents, exists for unavailable declarants where a prior opportunity for cross-examination existed, along with other exceptions motivated by the same historical analysis.

66. As the Court explained, this shift is necessitated by the understanding that the guarantee is procedural, not substantive. *Id.* at 61. Confrontation is a process for testing reliability, and so admitting testimony without confrontation because it is reliable is putting the cart before the horse, or "akin to dispensing with jury trial because a defendant is obviously guilty." *Id.* at 62.

67. Ohio v. Roberts, 448 U.S. 56, 64 (1980).

68. The question of purpose-focus or literalism in Confrontation Clause jurisprudence was not a new one. In *Maryland v. Craig*, 497 U.S. 836 (1990), for example, the Court permitted alleged child abuse victims to testify via closed-circuit television under certain circumstances. *Id.* at 857. In a vigorous dissent, Justice Scalia applied much the same reasoning as in *Crawford*, pointing out "[t]o say that a defendant loses his right to confront a witness when that would cause the witness not to testify is rather like saying that the defendant loses his right to counsel when counsel would save him, or his right to subpoena witnesses when they would exculpate him, or his right not to give testimony against himself when that would prove him guilty," *id.* at 867 (Scalia, J., dissenting), while arguing that, regardless of the purpose of the Confrontation Clause, it cannot be satisfied by any procedure where no literal confrontation takes place.

would not bar all hearsay evidence.[69] The Confrontation Clause guarantees the accused the right "to be confronted with the witnesses against him."[70] Much turns, then, on the meaning of "witness." One could imagine a definition under which the Confrontation Clause would be trivial in this context: if a "witness" is simply a person testifying at trial in the current action, all that would be promised would be the right of cross-examination.[71] To discern the precise meaning of "witness," Scalia employed his well-known "original public meaning" originalism.[72] After a historical analysis,[73] Scalia concluded that the intended meaning of "witness" includes anyone who offers testimony against the accused, not just those who testify in court. But only those who testify in court can be confronted. Thus, what the right to confrontation bars is the sort of out of court statement which makes a non-testifying declarant a witness against the accused, which Scalia calls "testimonial hearsay."[74]

Although "testimonial" was left undefined, Scalia noted that various proposed definitions share a "common nucleus"[75] and differ only in "levels of abstraction"[76] around this core. This nucleus seems to include, "at a minimum . . . prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations."[77] The core of testimonial hearsay, then, is out of court statements made to government officials by a declarant who does not testify as part of a legal proceeding or criminal investigation.[78] This core was sufficient to decide the case at bar, and the Court left it to future cases to explore how far the concept extends beyond its core.[79]

---

69. *Crawford*, 541 U.S. at 51 ("This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns.").

70. U.S. CONST. amend. VI.

71. *See Crawford*, 541 U.S. at 42–43 ("One could plausibly read 'witnesses against' a defendant to mean those who actually testify at trial . . . .") (citing Woodsides v. State, 3 Miss. 655, 664–65 (1837)). Such an interpretation, it should be noted, does not reduce the Clause to a triviality. It could guarantee, for example, the in-person presence of the accuser. *See supra* note 68 and accompanying text. For a critical discussion of the *Crawford* definition of "witness," see George Fisher, Essay, *The Crawford Debacle*, 113 MICH. L. REV. FIRST IMPRESSIONS 17, 19–20 (2014).

72. Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 422 (2013).

73. This historical analysis includes, as discussed below, an examination of common-law precedents. *See generally Crawford*, 541 U.S. at 48–51. Scalia links the Sixth Amendment to the common-law precedents, suggesting that the Amendment codified the common-law understanding of confrontation. *See id.* at 50.

74. *E.g.*, *id.* at 53.

75. *Id.* at 52.

76. *Id.*

77. *Id.* at 68.

78. *Id.*

79. Defending its choice to leave the concept undefined, the Court distinguished between this temporary uncertainty and the permanent uncertainty given by the unclear *Roberts* standard. *See id.* at 68 n.10.

The *Crawford* doctrine, then, is a constitutional prohibition on the admission of specific types of out of court statements made against a criminal defendant. It is justified by the claim that such statements, if admitted, would permit witnesses to accuse the defendant without confrontation, in violation of the Sixth Amendment.

## II. THE PRE-*CRAWFORD* WORLD

The *Crawford* doctrine was mined from the historical backdrop to the Sixth Amendment. To understand the Sixth Amendment, Scalia looked to the historical common-law understanding of confrontation.[80] That history, though, does not support the rigid distinction in *Crawford*. Rather, it suggests that confrontation extends well beyond the criminal context. Pre-*Crawford* Sixth Amendment jurisprudence, while more permissive as to the admission of testimonial hearsay, was also more permissive in the application of confrontation concerns in civil contexts. The *Crawford* doctrine, similarly, should extend to certain civil contexts; namely civil forfeiture.

Because Scalia situated *Crawford* historically, this Note will proceed historically in analyzing the law of confrontation. In analyzing the correct reach of the doctrine, it will turn first to its predecessors. These are of two sorts. First, early American cases applying common law evidence rules regarding confrontation but not construing the Sixth Amendment will demonstrate the common-law context. Next, the pre-*Crawford* understanding of the Sixth Amendment will be analyzed to see how *Crawford* modified the landscape.

### *A. Common Law of Confrontation*

We turn first to early common law cases.[81] *Crawford's* originalist logic presupposes that there be a common understanding of the scope of confrontation at the time of ratification, upon which the modern jurist should rely.[82] What we find, instead, is confusion.

A case in point is *United States v. Macomb*, where the court both denied a distinction between civil and criminal cases and recognized the confused state of the law.[83] In this action for mail theft, the court admitted, over

80. *See supra* note 73 and accompanying text.

81. The cases that follow are state cases occurring either before the Fourteenth Amendment or prior to incorporation. Hence, they do not apply the Sixth Amendment. These cases are informative precisely because we know that state cases prior to the Fourteenth Amendment are not influenced by the Sixth Amendment, despite it already having been ratified.

82. *See generally* Barnett, *supra* note 72.

83. United States v. Macomb, 26 F. Cas. 1132 (D. Ill. 1851).

objection, statements made by a witness, deceased at the time of trial, during a preliminary examination.[84] Denying a motion for a new trial, the court upheld the admission of the evidence.[85] The statements were sworn testimony, and the defendant was able to cross-examine.[86]

In finding the evidence admissible, the court explicitly considered whether evidentiary issues regarding confrontation are treated differently in civil and criminal trials.[87] The *Macomb* court answered that there was no such distinction.[88] Rather, the defining question was the ability to cross-examine: testimony without opportunity to cross-examine would be inadmissible in any case, and testimony offered with cross-examination would be admissible in any case.[89] The court also leaned heavily on the death of the declarant, noting that such evidence would likely be inadmissible if the declarant were alive.[90]

The court's explicit rejection of different admission rules for testimonial hearsay in civil and criminal cases is striking.[91] Certainly, the court did not disregard history in making this conclusion. The court discusses, for instance, the *Fenwick* case,[92] relied upon in *Crawford*.[93] Yet it reads the history, from common-law and American precedents, as "so great a conflict of authorities [that] the court is at liberty to decide the question upon principle."[94] Because the court here considered the common-law precedents, *Macomb* stands for the proposition that early American courts considered the question not fully resolved.[95]

84. *Id.* at 1132.

85. *Id.* at 1133.

86. *Id.* Although the defendant here took advantage of the opportunity to engage in "long and tedious cross-examination," *id*. at 1132, other cases have made clear that, even in the absence of such cross-examination, it suffices that the defendant had knowledge that the examination was taking place and could have cross-examined. *See, e.g.*, Bostick v. State, 22 Tenn. 344 (1842). Because knowledge of the examination is not the same as knowledge of the specific topics covered, one might think that actual presence or actual cross-examination is therefore required. The defendant could argue that had he known what would be discussed, he would have cross-examined.

87. *Macomb*, 26 F. Cas. at 1133–34.

88. *Id.* at 1134 ("If it be, on the whole, a sound rule to admit the declarations of a deceased witness, made on a former trial, in a case involving property or reputation, it is equally so in cases involving life and liberty.").

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 1133. In this trial for treason, witnesses against him left the country, and Fenwick was not convicted. *Id.* He did not, though, escape punishment, since Parliament then passed a bill of attainder. *Id.* That is not generally an option in American criminal prosecutions. *Cf.* U.S. CONST. art. I, § 9, cl. 3. In so doing, it relied upon a deposition given by an absent witness, while noting that such evidence would not be admissible in a court of law. *Macomb*, 26 F. Cas. at 1133. As the court notes, though, the witnesses in *Fenwick* were not dead, and there had been no opportunity for cross-examination. *Id.*

93. *See* Crawford v. Washington, 541 U.S. 36, 45–46 (2004).

94. *Macomb*, 26 F. Cas. at 1134.

95. *See id.* at 1133–34 (discussing conflicts of authorities and earlier cases).

These early common-law cases provide significant evidence that there was no firm line dividing civil and criminal cases in terms of hearsay and confrontation. *Crary v. Sprague & Craw*[96] not only illustrates this history, but also employs reasoning later echoed in pre-*Crawford* Sixth Amendment case law.[97] In a civil action to secure the payment of debt,[98] the plaintiff in *Crary* was able to admit, over the defendant's objection, testimony given at a previous trial on the same matter[99] by a witness who had died between the two trials. On a motion for a new trial, however, the court held that the evidence was improperly admitted.[100] That is, the court ruled that testimonial hearsay, even from a dead declarant, was not admissible even in a civil matter.[101]

The circumstances of *Crary* were complicated. The declarant had testified at the first trial for the defense; at the second trial, the plaintiff sought to admit the testimony.[102] That the witness testified originally for the party which later opposed admission can cut either way. The court considered the possibility that this weighed in favor of admission; after all, where the defendant introduced the evidence at the first trial, it is odd to argue against its admissibility at the second.[103] The court concluded, though, that the more decisive point was that the defendant was unable to rebut the testimony as would have been possible if the declarant had testified at the second trial.[104] That is, the totality of the circumstances here cut against admissibility, in the court's view; the court did not hold that such testimony is never admissible in civil cases.[105]

Nor did the *Crary* court hold that the standard for admissibility of testimonial hearsay is the same for civil and criminal cases. The court laid out rules for the admission of such evidence: it may only be admitted where the declarant is deceased and where the possibility for cross-examination

96. Crary v. Sprague & Craw, 12 Wend. 41 (N.Y. Sup. Ct. 1834).

97. *See* Ohio v. Roberts, 448 U.S. 56 (1980), discussed *infra* at Part II.B.

98. *Crary*, 12 Wend. at 44.

99. *Id.* This case followed a successful action in trover, where it emerged, after the judgment, that the disputed property was not held by either party, but by one of the witnesses at the original action. *Id.* at 44. This action was to prove the sale of the property. *Id.* at 44. It was the testimony of this witness, believed to have been in a conspiracy to deny the plaintiff of his title to the property via a newer sale, that was in dispute. *Id.* at 45–46.

100. *Id.* at 46. However, the court denied a motion for a retrial, since "the jury w[as] bound to render their verdict for the plaintiff independently of that testimony . . . ." *Id.*

101. *Id.*

102. *Id.* at 45–46.

103. *But see id.* (noting that, although called by the defendant, the witness was not in any other sense the defendant's witness).

104. *See id.* at 46.

105. *See id.* ("The position of a cause at the circuit sometimes makes it expedient . . . to risque the testimony of a witness interested against him . . . . [I]t would be a hard measure of justice to say the witness should ever after be not only a competent, but a credible witness in the cause for his adversary, whether dead or alive.").

existed prior to death.[106] Even then, the court held that evidence would be admitted only when necessary to decide the case.[107] It is possible that the *Crary* court would hold the standard of necessity to be more demanding in a criminal than a civil case.

The court did, though, deal explicitly with the notion that testimonial hearsay is categorically inadmissible in criminal cases, the position *Crawford* would later embrace.[108] While noting that such a position enjoys considerable support, the court summarily rejected it.[109] Acknowledging that such evidence should be admitted only rarely, the court, in dicta, refused to draw a bright-line rule between civil and criminal cases.[110]

Other cases explicitly compared the rules in civil and criminal cases, inferring rules for criminal cases from those in civil cases. In *Finn v. Commonwealth*,[111] a criminal defendant was convicted of forgery of bank notes.[112] During a preliminary hearing, a Mr. Candler had testified against the defendant.[113] While in jail awaiting trial, the defendant told another witness that what Mr. Candler had said was true.[114] The conversation ended there, but the defendant alleged that he had intended to go on to say that Mr. Candler's statements were incomplete and framed in such a manner as to falsely make the defendant appear guilty.[115] The court permitted the witness to testify at trial about the defendant's statement.[116] On this foundation, the prosecution admitted Mr. Candler's prior testimony.[117] Mr. Candler had left the jurisdiction by the time of trial and was still alive.[118] On appeal, the defendant challenged this testimony, and the appeals court reversed and remanded for a new trial.[119]

While the defendant had argued on appeal that the testimony was admitted on an insufficient foundation, the appeals court ruled on a different ground—that, regardless of the foundation, the testimony of Mr. Candler should not have been admitted at trial.[120] Noting that past testimony from

106. *Id.* at 44–45.
107. *Id.* at 44 ("[F]or the evidence of the former testimony is admitted only from necessity, and is justly liable to many exceptions . . . .").
108. *See id.* at 44–45.
109. *Id.* ("[I]t seems even still to be questioned by high authority if it be admissible at all in a criminal case, though I think it would.") (internal citations omitted).
110. *See id.*
111. Finn v. Commonwealth, 26 Va. 701 (1827).
112. *Id.* at 706.
113. *Id.* at 707.
114. *Id.* at 706–07.
115. *Id.* at 707.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 711.
120. *Id.* at 708.

deceased witnesses is admissible in civil trials where the party against whom the testimony is admitted had the possibility of cross-examination in the prior proceeding, the court found that this rule did not extend to criminal cases, nor to civil cases where the declarant is unavailable but alive.[121]

Thus, the *Finn* court gave a highly restrictive form of the rule on testimonial hearsay. This provided two grounds for rejecting the evidence here: that the case was criminal,[122] and that the declarant was alive. The court did not spell out how it would have ruled on a dead declarant in a civil case, but it did indicate that, even in a civil case, it would have prohibited testimonial statements from a live declarant.[123]

Thus, the right to confrontation existed, in common-law, in civil cases. That right, it is true, did not form the absolute bar described in *Crawford*. But the right to confrontation was less than absolute in criminal contexts as well.

In fact, some courts held that confrontation was less applicable in criminal than civil contexts. A case in point is *Johnston v. State*.[124] While *Finn* held that a right to confrontation, and hence ban on testimonial hearsay, exists in the civil context, *Johnston* sharply limited the prohibition on testimonial hearsay in criminal cases by holding that depositions, taken without the ability to cross-examine, may be admitted against criminal defendants where the deposed witness is deceased.[125] Nor did the *Johnston* court simply have a more limited view of confrontation, spanning criminal and civil cases; one of the reasons given for permitting such evidence was precisely the fact that the case was criminal.[126] The court reasoned that prohibiting these depositions would incentivize killing adverse witnesses.[127] The court seems to have assumed that this is a greater concern for criminal defendants than civil litigants.[128]

While a guilty defendant facing criminal charges might kill to avoid them, this is less likely to be true of civil litigants seeking to avoid financial loss or to secure financial gain. At the same time, civil litigants can face risks similar in scope to those accused of crimes, particularly misdemeanors.[129] *Johnston* seems to echo even earlier history, which

121. *Id.*
122. *Id.*
123. *Id.* ("Nor can we find that the rule in civil cases extends to the admission of the evidence formerly given by a witness who has removed beyond the jurisdiction of the country . . . .")
124. 10 Tenn. 58 (1821).
125. *Id.* at 59.
126. *See id.* at 60.
127. *Id.*
128. *See id.*
129. In this regard, see discussion of Mr. Parhamovich, *supra* Introduction, whose civil liability far exceeded his criminal liability.

distinguished between felonies and misdemeanors for just this reason.[130] Accused felons gained the right to confrontation later, historically, than did misdemeanants.[131] Following this logic, the prohibition on testimonial hearsay is strong in inverse proportion to the liability faced by the party opposing admission.[132] But *Crawford* applies in all criminal cases, regardless of the level of liability; to be consistent with the reasoning in *Johnston*, testimonial hearsay should be barred in civil cases where liability is less than that in the most serious criminal cases.

The common law, then, did not have an absolute prohibition on testimonial hearsay in criminal cases, and the prohibition in civil cases may have been understood to be just as strong as that in criminal cases. The right to confrontation appears to have been a common law right in all legal proceedings. It is in light of this common law tradition that the Sixth Amendment should be understood.

However, this history may seem irrelevant. Even if the reasoning of these cases suggests *Crawford* should extend to the civil forfeiture context, the objection would go, the Fourteenth Amendment changed the landscape by incorporating the Sixth Amendment to the states.[133] The Sixth Amendment could, as incorporated by the Fourteenth Amendment and as understood by *Crawford*, strengthen protections in the one case but not the other. That is, the Confrontation Clause could have guaranteed confrontation rights in criminal cases without impacting civil litigation and overridden any common law history suggesting that confrontation is the same in both cases.

This problem with this objection is that the point of *Crawford* is precisely that the Sixth Amendment codified an existing understanding of confrontation, and that understanding must govern its interpretation.[134] It is immediate, via familiar originalist arguments, that public understanding determines the bounds of the Sixth Amendment, and therefore, of

130. *See, e.g.*, Thomas Y. Davies, Dialogue, *Revisiting the Fictional Originalism in* Crawford's *Cross-Examination Rule: A Reply to Mr. Kry*, 72 BROOK. L. REV. 557, 594–96 (2007).

131. *See* Thomas Y. Davies, Symposium, Crawford *and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past: What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 107 (2005); *see also* Robert Kry, *Confrontation Under the Marian Statutes: A Response to Professor Davies*, 72 BROOK. L. REV. 493, 506 (2007).

132. This reasoning, then, would guarantee confrontation in a routine civil case, but perhaps not a "bet the business" patent dispute. Similarly, an accused shoplifter would be guaranteed the right to cross examine witnesses, but not necessarily an accused murderer. This reasoning, of course, is independent of Sixth Amendment guarantees.

133. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (recognizing incorporation of the Sixth Amendment).

134. *See* Crawford v. Washington, 541 U.S. 36, 42–43 (2004) ("We must therefore turn to the historical background of the Clause to understand its meaning."); *see also supra* note 73 and accompanying text.

*Crawford*.[135] Therefore, these early cases control our interpretation of the Sixth Amendment, because that Amendment incorporated the common law history, and with it, the understanding that confrontation is equally guaranteed in both contexts.

### *B. Sixth Amendment (and Related) Cases*

Just as common-law evidence cases do not suggest a sharp line between civil and criminal cases in terms of confrontation, neither do cases interpreting the Sixth Amendment and its state constitution analogues. The latter naturally forms a bridge between the state court analysis of the common law and the cases construing the Sixth Amendment, and so will be analyzed first.

Noting that testimonial hearsay, when admissible, must be presented in full, the court in *Commonwealth v. Richards* held testimony summarizing the statements of a then-deceased declarant held inadmissible.[136] In this criminal case for perjury, the court was construing the Confrontation Clause of the Massachusetts Declaration of Rights.[137] The court first held that testimonial statements from deceased declarants did not violate the Confrontation Clause.[138] Since a witness was recounting what was said by the declarant, the testimony was being offered "face to face."[139] The court considered, and rejected, the *Crawford* notion of an absolute prohibition on testimonial hearsay in criminal cases.[140] More importantly, the court looked to the civil precedent to find rules governing the admission of testimonial hearsay.[141] "But the rules of evidence in civil and in criminal cases are generally the same,"[142] said the court. It then went on to deduce that such depositions are generally admissible, but not where misleadingly incomplete, as in the case at bar.[143] And it did so in reliance on an analysis of a civil case.[144]

---

135. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997).

136. Commonwealth v. Richards, 35 Mass. 434, 439 (1836)

137. *Id.* at 437; MASS. CONST. art. XIII ("And every subject shall have a right . . . to meet the witnesses against him face to face . . . .").

138. *Richards*, 35 Mass. at 437 ("That provision . . . was not intended to affect the question as to what was or was not competent evidence to be given face to face according to the settled rules of the common law.").

139. For a further elaboration on this point, see Kendrick v. State, 29 Tenn. 479, 485–86 (1850). Here, the statements, made by a declarant deceased by the time of trial, were being recounted by a witness who heard them, and the witness was available for cross-examination. This is what the court described as "face to face." *Id.*

140. *Richards*, 35 Mass. at 437.

141. *Id.* at 438.

142. *Id.*

143. *Id.* at 439.

144. *Id.* at 439–40.

Of course, this is not to call into question the prohibition in *Crawford*[145]; the Court there was construing a different Clause, and, even if the results were contradictory, could have gotten the interpretation correct. However, the logic of *Crawford* suggests that state constitutional confrontation provisions should be interpreted the same way as the Sixth Amendment. They arose from the same common-law roots and codified the same pre-existing understanding.[146] *Richards* shows us, then, that the early understanding of constitutional confrontation provisions did not absolutely bar testimonial hearsay in the criminal or civil context. Rather, it was analyzed case-by-case, and the same analysis was applied in both contexts. This common ancestry, so to speak, and uniform application suggests that the rules should remain the same in criminal and civil contexts; when a new rule is announced in one context, it should apply in both.

In *State v. Houser*, the Missouri Supreme Court dealt explicitly with the history of the Confrontation Clause and gave an early foreshadowing of *Crawford*.[147] In this homicide case, the prosecution introduced the deposition of a live witness who was outside the jurisdiction of the court at the time of trial.[148] The defendant was convicted and sentenced to death.[149] Holding the evidence inadmissible, the state Supreme Court reversed.[150]

In construing the Sixth Amendment, the court placed it within the context of the American Revolution.[151] That Revolution, the court noted, was about "the rights and privileges which [sic] were secured to British subjects."[152] The court explained that, therefore, the Sixth Amendment's Confrontation Clause was to be understood as guaranteeing that right as it was understood in the British common law and statutory law at the time, adapted to American circumstances.[153] It equated depositions from deceased declarants

145. It does, though, call to our attention the tension between public-meaning originalism and the historical approach in *Crawford*. It is difficult to conceive that the reasoning in *Crawford* would rely upon the public being familiar with the long history of confrontation. Rather, the historical analysis appears to be an effort to show what the Sixth Amendment meant; i.e. it appears to be an exercise in original intent. Similarly, the notion that there is a correct interpretation of the Clause, to be deduced not from its application but from its predecessors, relies heavily upon an original intent construction. *Compare* Davies (2007), *supra* note 130, at 571–73, *with* Barnett, *supra* note 72, at 415–18. A solution to this contradiction is a form of originalism, in which meaning is derived from existing common law when a term requires a legal definition, and from public meaning when a non-legal definition is required.

146. *See* Crawford v. Washington, 541 U.S. 36, 49 (2004) ("Early state decisions shed light upon the original understanding of the common-law right.").

147. State v. Houser, 26 Mo. 431 (1858).

148. *Id.* at 432.

149. *Id.*

150. *Id.* at 441. In Missouri, appeals raising constitutional issues, whether the Missouri Constitution or the US Constitution, may proceed directly to the state Supreme Court without passing through the intermediate appeals court. MO. CONST. art. V, § 3. At the time of this case, there were no intermediate appellate courts. *Cf.* MO. CONST. OF 1820, art. V., §§ 2, 6, 13.

151. *Houser*, 26 Mo. at 433–34.

152. *Id.* at 433 (quoting Virginia Resolves).

153. *Id.* at 434.

with dying declarations; because the common law, and American precedents, had permitted dying declarations, it followed that the Constitution could not have prohibited these depositions.[154]

In *Houser*, though, the declarant was not dead, only unavailable.[155] By explicitly linking the admissibility of depositions to the admissibility of dying declarations, the court reasoned that unavailable deponents were different, and their depositions inadmissible.[156]

*Houser*, like *Crawford* after it, explicitly held that this prohibition applied, at least in its strongest form, only in criminal cases.[157] This is because the revolutionary assertion of the rights of British subjects was about rights as against the government.[158] The revolutionaries asserted "immunities and privileges granted and confirmed to them by royal charters."[159] These did not include any particular rules of evidence in civil matters.

The *Houser* court, though, did not explicitly reject such a prohibition, as the *Crawford* Court did. In fact, it arguably left the door open to a prohibition on testimonial hearsay in certain civil cases. The civil cases under consideration here, such as assert forfeiture, are indeed against the government. The common law may well have extended the same protections, including the right of confrontation, in such proceedings, if they were used then as they are today.[160] We are left with the open-ended question of just what the rights of British subjects against their government were; the *Crawford* court assumed that those rights applied only in criminal cases, but without proof.[161] The revolutionaries, after all, fought just as much against arbitrary seizure of goods as against abusive criminal prosecution.[162]

---

154. *See id.* at 437–38. *But see* State v. McO'Blenis, 24 Mo. 402, 416–18 (1857) (treating depositions of deceased witnesses as exception to hearsay rules based on common practice). The *Houser* court declined to endorse the reasoning in *McO'Blenis*. *See Houser*, 26 Mo. at 438–39.

155. *Houser*, 26 Mo. at 431–32.

156. *Id.* at 438.

157. *Id.* at 439 ("The admissibility of depositions in civil and criminal cases depends upon different grounds.").

158. *See id.* at 434.

159. *Id.* (quoting Virginia Resolves).

160. *See infra* Part III.A.

161. It is noteworthy that framing-era British criminal procedure was, in some ways, more like our civil forfeiture proceedings than our criminal procedure today. For a discussion of that procedure, see Davies (2005), *supra* note 131, at 127–29.

162. The Charters referenced the "Jurisdiccons, Rights, Royalties, Liberties, Freedoms, Immunities, Priviledges, Franchises, Preheminences and Commodities [sic]" of Englishmen. *E.g.*, Charter of Mass. Bay (1691). These would include the English Bill of Rights of 1689, which established, *inter alia*, "That levying money for or to the use of the Crown be pretence of prerogative . . . is illegal; . . . [t]hat all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void . . . ." Just as relevant, though, is the Revolution's basis in a revolt against "taxation without representation," itself a form of arbitrary seizure of property.

The foil against which *Crawford* operated was *Ohio v. Roberts*.[163] The pre-*Crawford* approach is typified by this criminal case, in which the defendant was charged with forgery and possession of stolen credit cards.[164] At a preliminary hearing, the defense called the victim's daughter, Anita Isaacs, to testify.[165] At trial, the prosecution sought to subpoena the same witness, but was unable to produce her for trial.[166] The prosecution, then, using a state law provision,[167] sought to admit the transcript of her preliminary examination testimony.[168] When her mother presented evidence that Anita Isaacs could not be located, the transcript was admitted over objection.[169] The defendant was convicted.[170] The appeals court reversed, finding that the prosecution had not sufficiently shown the witness' unavailability.[171] The Ohio Supreme Court found that the witness was unavailable, but affirmed the judgment of the appeals court because the defendant had not had the opportunity to cross-examine the witness.[172]

Considering just the common-law holdings, the case echoes *Crary*.[173] Just as in that case, the issue here was the admission, against one party, of the transcript of that party's own witness in a prior proceeding. The *Crary* court likely would have refused to admit the evidence, based on the same reasoning as the Ohio Supreme Court, making this case the criminal analogue of *Crary*. However, the case would take a different turn at the Supreme Court.

The Supreme Court reversed the Ohio Supreme Court, holding that the evidence was properly admitted.[174] The Court in *Roberts* considered the Confrontation Clause as inextricably linked to the common-law jurisprudence around the hearsay rule and its exceptions.[175] Indeed, the Court began with the claim that, strictly applied, the Confrontation Clause would "abrogate virtually every hearsay exception [in criminal cases]."[176] Considering this result untenable, the Court concluded that some

163. Ohio v. Roberts, 448 U.S. 56 (1980).
164. *Id.* at 58.
165. *Id.*
166. *Id.* at 59.
167. OHIO REV. CODE § 2945.49 (1975). In contrast to the common-law provisions discussed, requiring the death of the declarant be shown, this statute requires only that the witness be shown to be unavailable.
168. *Roberts*, 448 U.S. at 59.
169. *Id.* at 59–60.
170. *Id.* at 60.
171. *Id.*
172. *Id.* at 60–61.
173. *See supra* notes 96–107 and accompanying text.
174. For the essentials of the holding, see *supra* note 50 and accompanying text.
175. *Roberts*, 448 U.S. at 63 (citing California v. Green, 399 U.S. 149, 156–67 (1970)); *see also* Richard D. Friedman, Essay, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1017–19 (1998).
176. *Roberts*, 448 U.S. at 63 (citing Mattox v. United States, 156 U.S. 237, 243 (1895)).

unconfronted evidence must be admissible.[177] This echoes *Crary* once again, this time in its "necessity" reasoning.[178] The Court reasoned that the Confrontation Clause imposed two requirements. First, it required that the government show the unavailability. This weakened the previous requirement that the declarant be deceased, but served the same purpose: a demonstration of necessity.[179] Second, it required that the government show that the evidence is reliable enough to obviate the need for cross-examination at trial.[180] The government could demonstrate the latter either by fitting a "firmly rooted hearsay exception,"[181] or through "particularized guarantees of trustworthiness."[182]

In *Roberts*, the Court relied upon the Ohio Supreme Court's finding that the witness was unavailable.[183] It then reversed the decision of that court by finding that the evidence bore "indicia of reliability."[184] Although there was no opportunity to cross-examine, the Court held that the questioning at the preliminary examination was similar enough to cross-examination to yield the same reliability guarantee.[185]

This historical analysis shows *Roberts* for what it is. While Scalia in *Crawford* claims *Roberts* reached the right conclusion for the wrong reason,[186] the method employed in *Roberts* is not distinct from that in *Crawford*. What differs is the weight given to the various factors in the historical analysis. While *Crawford* emphasizes the metaphor between testimonial hearsay and ex-parte preliminary hearings,[187] *Roberts* places testimonial hearsay within the hearsay context and analyzes reliability and necessity. Although Scalia caricatures *Roberts* as ignoring the right to confrontation whenever it seemed unlikely to sway the jury,[188] the *Roberts* analysis fit squarely into the common law understanding of confrontation interpreting the Sixth Amendment in parallel to the common law right of confrontation in civil proceedings. As in *Macomb*, the *Roberts* Court looked

177. *See id.*
178. *See supra* note 107 and accompanying text.
179. *Roberts*, 448 U.S. at 65.
180. *Id.*
181. *Id.* at 66. The Court's reliance on "firmly rooted hearsay exceptions" hearkens back to common-law evidence rules regarding hearsay. *See* discussion *supra* Part I.A. Just as it did in *Crawford*, the Court here was relying on the understanding that the Sixth Amendment references the common law as it operated at the time of its adoption.
182. *Roberts*, 448 U.S. at 65.
183. *Id.* at 61.
184. *Id.* at 68.
185. *Id.* at 70–71. Although no citation is made to *Crary*, the similarity in the reasoning is striking.
186. Crawford v. Washington, 541 U.S. 36, 60 (2004) ("Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales.").
187. *Id.* at 50.
188. *Id.* at 62.

to the availability of cross-examination, not as a formal requirement, but as a factor in determining reliability.[189] While *Roberts* expands the scope of unavailability by including live declarants who are unable to testify, it follows *Crary* in looking to the necessity for accurate adjudication.[190]

The holding in *Crawford* corrected the *Roberts* jurisprudence by fully incorporating the plain language of the Sixth Amendment and providing greater protection for criminal defendants. To remain true to its common-law sources, *Crawford* requires not only the prohibition on testimonial hearsay in criminal cases Scalia delivered, but also simultaneous protections in civil actions. That is, the historical analysis shows that *Roberts* was right in connecting the criminal and civil standards, as was the case in *Crary*. The Court's decision in *Crawford*, that greater protection was needed in criminal cases, therefore should not leave civil cases unprotected. Instead, as a matter of policy and logic, the standard for admission should remain the same in criminal cases as in civil cases, which are suitably similar. Since *Crawford* understands the Sixth Amendment to require an absolute prohibition in criminal cases, that prohibition should similarly apply in certain civil contexts. The suitably similar cases include, at a minimum, civil forfeiture.

## III. SOLUTIONS

*Crawford's* historical reasoning relied upon incorporating the common-law understanding of confrontation into the Sixth Amendment.[191] This common-law understanding did not differentiate between the civil and criminal contexts.[192] The Sixth Amendment's enhanced protections for criminal defendants, seen through this lens, should find their way to certain civil contexts. *Crawford's* reasoning means that the gate between the criminal and civil worlds, while not fully open, allows passage of some Confrontation Clause vessels. Civil forfeiture is an area of law ripe for such commerce.

### *A. Constitutional Solutions*

The argument for *Crawford* protections in the civil forfeiture context proceeds by analogy. Beginning with two points, criminal law and civil forfeiture, sitting remote from one another, *Crawford's* history has advanced criminal procedural protections in the civil direction. This Part

189. *Compare Roberts*, 448 U.S. at 66, *with* United States v. Macomb, 26 F. Cas. 1132, 1134 (1851).

190. *Compare Roberts*, 448 U.S. at 74, *with* Crary v. Sprague & Craw, 12 Wend. 41, 44–45 (N.Y. Sup. Ct. 1834).

191. *See* discussion *supra* Part I.

192. *See* discussion *supra* Part II.

will now argue that civil forfeiture resembles a criminal context, continuing to narrow the gap between the two points. The goal, of course, is to bring them close enough that their distance is of no constitutional moment.[193]

Nor is there much distance to travel.[194] As early as 1886, the Court narrowed the gap in *Boyd v. United States*.[195] The Court in *Boyd* declared unconstitutional a tax law providing for forfeiture of items imported under falsified paperwork, such that the "United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise . . . ."[196] The law also authorized the government to demand invoices and other evidence, in order to prove fraud for forfeiture purposes.[197] The case at bar was a forfeiture action, with no associated criminal prosecution, issued for twenty-nine cases of glass.[198] As part of the proceeding, the District Court issued a court order, requiring the owners of the glass to produce invoices, which were then used as evidence in the forfeiture action.[199] The jury found for the government and the property was forfeited.[200] The owners challenged the action under the Fourth and Fifth Amendments. The Circuit Court affirmed, but the Supreme Court reversed the judgment.[201] For present purposes, the Court's Fifth Amendment analysis is most relevant.

The compelled production of invoices can only be a Fifth Amendment violation if there is a criminal charge, and so the Court took up the question of whether there was such a prosecution. En route to holding the law unconstitutional,[202] the Court held that "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature

193. Two points cannot be distinguished if the resolution—the sharpness and clarity of the image in which they appear—is insufficient. The resolution in the constitutional context is largely determined by the canon of constitutional avoidance.

194. Shortly before publication, the Supreme Court held in Timbs v. Indiana, 139 S.Ct. 682 (2019), that the Eighth Amendment Excessive Fines Clause is incorporated to the states, and that this incorporation extends to "punitive" forfeitures. *Id.* at 690. The Court relied on its prior holding, in Austin v. United States, 509 U.S. 602, 606–07 (1993), that the Excessive Fines Clause is not limited to the criminal arena, but applies to civil procedures which might be considered "punitive." *Id.* at 619. This holding, though, has little effect on the arguments here. The primary impact is on the arguments comparing criminal penalties to forfeiture losses. At most, *Timbs* will result in limiting forfeiture losses to the monetary equivalent of criminal penalties which could have been imposed. This Note has highlighted, for instance in the Introduction, instances where forfeiture losses exceeded any potential criminal penalties; the arguments remain no less true, though, if forfeiture allows for equivalent harm with a lower evidentiary bar.

195. 116 U.S. 616 (1886).

196. *Id.* at 618 (quoting 18 Stat. 186 § 12 (1874)).

197. *Id.* at 620–21.

198. *See id.* at 617–18.

199. *Id.*

200. *Id.* at 618.

201. *Id.* at 618, 638.

202. *Id.* at 754.

criminal."[203] This was because, *inter alia*, the forfeiture was based on allegations of both criminal fraud and tax evasion.[204] To treat such forfeiture as civil based solely on the form of the proceeding would allow the government to choose to proceed, in an otherwise criminal case, to "take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens."[205] It is, according to the Court, the substance of the claim that governs. And the substance here was that the items were subject to forfeiture for violation of criminal laws; hence, the substance was criminal. The process due flows from this substance, not from form.[206]

It is true that, "[i]n spite of the Boyd Court's admonition, the courts have, for the most part, long abandoned this duty with respect to civil forfeitures."[207] Yet this is no reason that the courts cannot again take up this cudgel. Since *Crawford*'s logic suggests application in the civil context, *Crawford* can serve a useful function in reining in forfeiture.

To see the criminal nature of civil forfeiture proceedings, their precise nature must be analyzed. "The distinguishing characteristic of a criminal forfeiture provision is that, unlike the in-rem character of civil forfeiture, the personal guilt of the defendant is at issue."[208] By inversion, then, a civil forfeiture proceeding is an in-rem proceeding where the personal guilt of the defendant is not at issue. The Court has explained that the justification for this rests "upon the fiction that inanimate objects themselves can be guilty of wrongdoing."[209] Yet this fiction is not without its critics, among them Blackstone, who described it as "based upon a 'superstition' inherited from the 'blind days' of feudalism."[210] The notion that property commits crimes on its own is an objectionable basis for claiming civil forfeiture

203. *Id.* at 633–34.

204. *See id.* at 634.

205. *Id.*

206. *See id.* The case of Phil Parhamovich, *see* discussion *supra* Introduction, also presented this Fifth Amendment issue. Precisely this situation is described in Jay A. Rosenberg, Note, *Constitutional Rights and Civil Forfeiture Actions*, 88 COLUM. L. REV. 390, 397 (1988), as a "double bind." As Rosenberg explains, claimants must assert property interests to fight forfeiture proceedings. *Id.* Asserting property interests, where the government alleges that the property was involved in a crime, though, means waiving the privilege against self-incrimination. *Id.* Parhamovich denied his property rights precisely to avoid perceived self-incrimination. Thus are Fourth and Sixth Amendment rights intertwined in this context, forming a second "double bind" and escaping constitutional scrutiny only because of the fiction that forfeiture is non-criminal.

207. Piety, *supra* note 16, at 921.

208. United States v. Veon, 538 F. Supp. 237, 242 (E.D. Cal. 1982) (citing The Palmyra, 25 U.S. 1 (1827)).

209. United States v. U.S. Coin & Currency, 401 U.S. 715, 719 (1971). This case concerned forfeiture proceedings after the Circuit Court voided criminal convictions. The government, rather than challenging the voiding, proceeded on the theory that the owner's guilt or innocence was irrelevant if the money was used illegally, in this case in violation of tax laws. *Id.* at 718–19. As the Court noted, the government's view amounted to the claim that, if money is left in an office, and is then used for illegal gambling by someone other than its owner, it may be forfeited. *Id.*

210. *Id.* at 720–21 (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES *300).

actions are not criminal.[211] That which was an ancient superstition to William Blackstone ought not be unquestioned truth today.

Thus, not only do forfeiture actions resemble criminal proceedings,[212] but also, any effort to explain why they are not criminal to the modern listener is doomed to fail. The modern world is unwilling to accept that objects commit crimes or become possessed by devils, or that they may be cleansed by being given to God's agent on Earth, the government. However, a definitive answer on this question is not needed. It is enough to say: where it is doubtful that the proceedings can be anything but criminal accusations against the property owners, and it is doubtful that a procedural protection such as *Crawford* does not apply in civil contexts, the "double doubt" should be resolved in favor of the protection of innocents.[213]

What's more, even *Crawford's* explicit limitation to criminal contexts is unavailing.[214] This is because, following the same logic as *Crawford's* main holding, *Crawford's* reference to criminal contexts must mean criminal as understood by the Sixth Amendment. When the Sixth Amendment refers to criminal proceedings, it codifies the common-law understanding of criminal law. As we have seen, although today we understand civil forfeiture contexts to be outside of criminal law, the common-law understanding contemporary with the sources *Crawford* drew on viewed forfeiture as criminal and granted criminal protections under the Fifth Amendment.[215] Therefore, for *Crawford's* purposes, forfeiture must fall under the criminal law umbrella.

### *B. Legislative Solutions*

While judicial action is the most obvious remedy, legislative action may be more palatable in light of separation of power concerns. As a matter of right, following the arguments above, *Crawford* extends to civil contexts. It

211. For a detailed description of forfeiture's history, including its roots in demonic possession, and in removing taint from objects supposedly responsible for people's deaths by passing them to the Crown as God's agent, see Piety, *supra* note 16, at 927–42. It is difficult for the modern eye to ignore the self-dealing potential of a theory in which the government decides which objects are possessed and declares that they can be cleansed by being given to the government.

212. *See* discussion *supra* Part III.A.

213. While this "double doubt" is not quite a case for the rule of lenity, *see, e.g.*, United States v. Santos, 553 U.S. 507, 515 (2008), because neither of the doubts is plainly in the criminal arena, similar reasoning holds. The rule of lenity requires lawmakers to be explicit in writing criminal statutes. *See generally* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885 (2004). Similarly, resolving the two doubts here in favor of greater protection against forfeiture prevents the government from imposing criminal sanctions without passing criminal statutes, and hence being subject to the evidence rules in criminal proceedings.

214. *Cf.* Crawford v. Washington, 541 U.S. 36, 43 (2004) (looking only to the past treatment of confrontation in criminal law, explicitly ignoring civil contexts). Courts, of course, are free to restrict their holdings but cannot restrict the reach of their logic or precedents.

215. *See* discussion *supra* Part III.A.

remains for the courts, though, to determine precisely which civil contexts. After all, this insight is grounded in the common-law, and the notion that the common-law of confrontation was codified by the Sixth Amendment, not some abstract notion of confrontation roaming at large. Pre-*Crawford* Sixth Amendment cases hewed true to this common-law doctrine, just as *Crawford* did. *Crawford* changed the landscape by expanding the realm of exclusion. The courts need to determine, as a matter of constitutional law, just how far into the civil realm *Crawford* reaches. Due to the similarity between civil forfeiture and criminal prosecutions, the courts should expand *Crawford* to include civil forfeiture. However, this raises separation of power concerns and may, at least in the eyes of a cautious jurist and the opponent of judicial activism, give the courts too much freedom of action. In the face of that objection, it is also true that Congress can, and should, act.

In 2000, Congress passed the Civil Asset Forfeiture Reform Act (CAFRA).[216] This law requires (rather incredibly) that the government show grounds for forfeiture to a preponderance of the evidence.[217] Courts have held that CAFRA also required that the government's evidence (again, rather incredibly) be in compliance with the FREs.[218] Thus, post-CAFRA, hearsay is no longer admissible in civil forfeiture cases, subject to the exceptions in the FREs. This legislative movement in favor of limiting admissibility of evidence in civil forfeiture cases could be carried further by specifically prohibiting, either in law or in the FREs themselves, testimonial hearsay in such cases.

Congress should do so. It should do so not simply because examples like Mr. Parhamovich show the unfairness of admitting such testimony, but rather because even if not constitutionally mandated, such a limitation is consistent with the thinking of *Crawford* and its constitutional reasoning. As seen,[219] *Crawford's* reasoning is premised on the Sixth Amendment's codifying the existing common-law understanding of confrontation. That understanding, at its heart, hearkens back to negative reaction to the Marian

216. Pub. L. No. 106-185, 114 Stat. 202 (2000).

217. United States v. 92,203.00 in U.S. Currency, 537 F.3d 504, 507 (5th Cir. 2008). If this case styling looks silly, the reader might consider this yet more evidence that our intuitions reject the notion of guilty property. *See* Piety, *supra* note 16, at 916 n.22.

218. *See, e.g.*, *92,203.00 in U.S. Currency*, 537 F.3d at 509; *see also* United States v. .30 Acre Tract of Land, 425 F. Supp. 2d 704 (M.D.N.C. 2006); United States v. One 1991 Chevrolet Corvette, 390 F. Supp. 2d 1059 (S.D. Ala. 2005); United States v. Six Negotiable Checks in Various Denominations Totaling One Hundred Ninety One Thousand Six Hundred Seventy One Dollars and Sixty Nine Cents, 207 F. Supp. 2d 677 (E.D. Mich. 2002); United States v. 2526 Faxon Ave., 145 F. Supp. 2d 942 (W.D. Tenn. 2001). See *supra* note 217, for commentary on case names; if the case name there did not seem silly, the reader will likely have a different opinion at this point; see also *supra* note 211. The law did carve out an exception for Temporary Restraining Orders; when the government seeks such an order, the FREs still do not apply. *See 92,203.00 in U.S. Currency*, 537 F.3d at 510.

219. *See supra* note 73 and accompanying text.

Bail and Committal Statutes.[220] The Sixth Amendment, as explained earlier, is seen, as a reaction to the creep of inappropriate procedures into criminal law, including ex-parte testimony without cross-examination.[221] In civil forfeiture, the same concern arises. Rather than importing procedure into the criminal context, though, the entire procedure has simply been migrated to the civil courts.[222] The effect is to "bypass entirely the cumbersome criminal justice system, with its tedious set of impediments to investigation, prosecution, and conviction, and substitute a control system consisting of civil sanctions."[223] Exporting criminal cases out of the criminal system is no different than smuggling civil procedure into it.

Just as colonial legislatures and courts, and eventually the Framers, reacted against the Marian Statutes by establishing the right to confrontation and codifying it in the Sixth Amendment, so too must we react today against the use of the same procedure to threaten our liberty and property.[224] The same policy concerns that motivated the development of our current jurisprudence call for redress in the civil forfeiture context. If the image motivating *Crawford*, the presentation of testimony obtained in secret, without facing the crucible of adversarial proceedings, against criminal defendants, arouses our indignation, it must be no less aroused by the exact same procedure when applied to those who stand to lose significant property to the government, under a legal doctrine developed from an ancient superstition.

### *C. Further Consequences*

While this Note has focused on civil asset forfeiture, the observation that *Crawford's* common-law ancestry did not reliably distinguish civil and criminal contexts has deeper implications. Certainly, where there is "double doubt," as in civil forfeiture, the argument is stronger.[225] Taken seriously, though, the larger thesis might suggest that confrontation should, not as a constitutional but as a policy matter, exist in all legal proceedings. This

220. These statutes allowed pre-trial examination of defendants by justices of the peace, the records of which were eventually used as evidence. *See* Crawford v. Washington, 541 U.S. 36, 43–44 (2004). In *Crawford*, they are characterized as the principal sort of evil against which the Sixth Amendment is meant to protect. *Id*; *see also* discussion *supra* note 66 and accompanying text.

221. *See supra* Parts I, II.B.

222. *See supra* Part III.A; *see also* Piety, *supra* note 16, at 921–24.

223. Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 925 (1987).

224. The property threat is clear. The liberty threat arises from the use of the threat of forfeiture as a means to compel confessions, particularly where criminal penalties may pale in comparison to the property loss faced. *See generally* Rosenberg, *supra* note 206, at 394–401 (discussing Fifth Amendment self-incrimination concerns that arise in the effort to fight forfeiture proceedings).

225. *See supra* note 213 and accompanying text.

would be an uncomfortably large shift in civil procedure and would impose a heavy burden on the already complex task of discovery.

Yet it is not without its own policy advantages. As Scalia notes, abandoning cross-examination because the testimony is reliable is akin to abandoning a trial where the defendant is guilty.[226] We would no more, though, dispense with civil trials because, for instance, the contract was obviously breached, then we would with criminal trials because the defendant is obviously guilty. Certainly, most would be less comfortable with such a procedure in the criminal than civil context, but that is because of our perception of the consequences. As seen, our intuitions fail us in the civil forfeiture context.[227] They fail us too, though, in other civil contexts. A misdemeanor shoplifting conviction is no picnic, but it is difficult to argue that it is a more extreme consequence than improperly losing a multi-billion-dollar patent, or a civil deportation hearing.

Moreover, intuitions can cut as easily in the other direction. If the stakes for the defendant are typically higher in criminal cases than for either party in civil matters, so are the stakes for society of a wrongful acquittal. As discussed, threads in the common-law history reflect this, making more evidence admissible in prosecutions for felonies than misdemeanors.[228]

Setting aside the impact of the outcome, we can also consider the impact of each piece of evidence on the outcome. In criminal matters, "beyond a reasonable doubt" is the standard burden for conviction. In civil matters, either party can generally prevail on the preponderance of the evidence.[229] On average, then, an individual piece of evidence will have a larger impact on the outcome of a civil case than a criminal case. This is a matter, though, reserved for further research.

Also reserved for further research is the impact *Crawford* should have on originalist thought. The methodology in *Crawford* rests uneasily with public-meaning originalism, yet its logic and conclusion do not. An understanding of originalism which incorporates the common law into the meaning of constitutional provisions, as a complement to the public meaning, can rectify this tension. This Note has illustrated just that sort of originalist analysis on the Confrontation Clause; it remains to develop such an idea philosophically and to apply it to other constitutional provisions.

226. *See supra* note 66 and accompanying text.

227. *See* discussion *supra* Part III.A.

228. *See* Johnston v. State, 10 Tenn. 58 (1821); *see also* discussion *supra* note 124 and accompanying text.

229. *See, e.g.*, United States v. Fatico, 458 F. Supp. 388, 404–06 (describing various standards of proof) (E.D.N.Y. 1978). In both cases, the reference is to the final determination, not evidentiary matters or other interlocutory questions.

## CONCLUSION

The *Crawford* doctrine, presented as a matter of historical originalism, reads its sources in an overly narrow manner.[230] It is true that the Sixth Amendment codified the common-law understanding of confrontation, and that this understanding emerged, in part, in response to abuses in the criminal context.[231] It does not follow, however, that the common law limited confrontation to criminal procedure. It, in fact, did not.[232] Pre-*Crawford* construction of the Sixth Amendment respected the common law precedents.[233] Far from a break with those precedents, *Crawford* is best seen as, for good reason, strengthening the protection offered in criminal cases.[234] The failure of precedent to distinguish sharply between civil and criminal contexts, though, means that *Crawford's* protections should be applied in at least some civil contexts as well.[235]

The civil forfeiture context is a particularly ripe context to apply these protections, since it is arguably a criminal context.[236] Even if we are uncertain on both claims, there arises a "double doubt," which ought to be resolved in favor of protection.[237] If concerns remain about excessive constitutionalization of this procedure, there remain legislative options, which would continue an established trend.[238] Finally, the prohibition on testimonial hearsay might logically be extended, not as a constitutional matter but as a policy matter, to all civil proceedings.[239]

*Joshua Katz*[*]

230. *See supra* Part I.
231. *See supra* Part II.
232. *See supra* Part II.A.
233. *See supra* Part II.B.
234. *See supra* Part II.B.
235. *See supra* Part III.
236. *See supra* Part III.A.
237. *See supra* Part III.A.
238. *See supra* Part III.B.
239. *See supra* Part III.C.

* JD, Washington University (2019); MS (Mathematics), University of Connecticut (2015); BA (Mathematics/Philosophy), SUNY Geneseo (2004). I wish to thank Professors Daniel Epps and David Rosen (Washington University) for their insight and direction on this Note. From the *Washington University Law Review*, I wish to thank Notes Editors Bayley F. Johnson and Emily Bartlett, Senior Executive Editor Kelly King, Executive Editor Rachel Yidana, and all the Staff and Senior Editors who contributed to this Note. I would also like to thank Editor-in-Chief Nathan Finkelstein and Managing Editor Jennifer Juehring. Finally, of course, I would like to thank my family and friends. All errors and omissions are mine alone.